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IN THE

Supreme Court of the United States

MOBIL CORPORATION AND
HONEYWELL INTERNATIONAL INC.,

Petitioners,

v.

BRUCE W. ADKINS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF 3M COMPANY AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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MOTION OF 3M COMPANY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the 3M Company ("3M"), formerly known as Minnesota Mining & Manufacturing Company, moves for leave to file the accompanying brief as *amicus curiae* in support of petitioners. Like petitioners, 3M has been named as a defendant in the mass asbestos tort litigation in the West Virginia state courts that is the subject of the petition. 3M did not join in petitioners' request for relief from the West Virginia Supreme Court because, at the time petitioners sought relief, the trial court had not ruled that 3M would be grouped together with other defendants in the mass trial proceeding on "common issues." After the decision below, however, the trial court determined that 3M would be included in a "common issues" trial, and on August 12, 2002,

the court directed that 3M would be part of a group trial, together with manufacturers and distributors of asbestos-containing products, commencing six weeks later on September 23, 2002. Thus, 3M has a strong interest in ensuring that the state trial proceedings are conducted fairly and with proper regard for the parties' due process rights.

Petitioners have consented to the filing of all *amicus curiae* briefs submitted to assist the Court in its consideration of the petition, and have filed a written consent with the Court so stating. Respondents represented by Ness, Motley, P.A. have refused to consent to the filing of any *amicus curiae* briefs, and have filed a written refusal with the Court so stating. 3M accordingly seeks leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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BRIEF OF 3M COMPANY AS *AMICUS CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICUS CURIAE*

3M Company ("3M") is a defendant in the mass asbestos trial underlying the writ proceeding in the West Virginia Supreme Court of Appeals that is the subject of the petition for certiorari.[1] 3M has been sued in the West Virginia asbestos cases not as a manufacturer or distributor

[1] Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored this brief in whole or in part, and no person or entity, other than 3M, made a monetary contribution to the preparation or submission of the brief.

of asbestos containing products, or as a premises owner or an employer, but instead as a manufacturer of respiratory protection products that contained no asbestos. 3M submits this brief as *amicus curiae* because, as explained below, it was not included in the mass trial at the time the West Virginia Supreme Court of Appeals heard Mobil Corporation's petition for a writ of mandamus or prohibition. 3M, therefore, was not a party to the Mobil writ proceeding. On May 6, 2002, after the decision below by the West Virginia Supreme Court of Appeals, the trial court issued a ruling that the claims against 3M would be included in the mass trial scheduled for September 23, 2002. 3M thus has a strong interest in whether the mass trial complies with the requirements of due process.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE TREATMENT OF CLAIMS AGAINST 3M FURTHER DEMONSTRATES THE DUE PROCESS VIOLATIONS PERPETRATED BY WEST VIRGINIA'S MASS TRIAL PROCEDURE.

The underlying asbestos mass trial proceeding involves claims by thousands of plaintiffs.[2] The claims collectively include hundreds of different asbestos-containing products which allegedly were used at hundreds of employment sites located in many different States. With the exception of 3M, plaintiffs have sued companies they allege (a) manufactured, supplied, distributed or installed products containing asbestos; (b) are liable under a premises liability

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[2] No one knows exactly which cases are involved in the mass trial proceeding scheduled for September 23, 2002. Parties have estimated that the mass trial may involve as many as 10,000 cases, and approximately 2,000 cases against 3M are included.

theory based on the presence of asbestos at their facilities; and/or (c) are liable as an employer based on the plaintiff's exposure to asbestos during his or her employment.

Unlike the other defendants, 3M was sued over respiratory protection products. Plaintiffs allege that two 3M products are at issue, a respirator known as the Model 8710 and a nuisance dust mask known as the Model 8500. These two products are entirely different in terms of materials, design, purpose, and use. However, neither product contained any asbestos.[3]

The subject of Mobil's writ proceeding and the decision below is the trial court order requiring a mass trial, which was entered on February 26, 2002 (the "Trial Scheduling Order"). The Trial Scheduling Order requires three "Phase I" trials of supposed "common issues" to

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[3] 3M's Model 8710 respirator was designed to reduce (not eliminate) a user's exposure to airborne asbestos. It was certified by the National Institute of Occupational Safety and Health ("NIOSH") for that purpose in 1972. *See* 30 C.F.R. part 11 (1972). The Model 8710 respirator was a member of one class of respirators that federal regulations under the Occupational Safety and Health Act required to be used starting in the early 1970s in certain workplace environments, where specified levels of airborne asbestos were present, to reduce exposure levels below those prescribed by the Occupational Safety and Health Administration ("OSHA"). *See* 29 C.F.R. § 1910.93a(c)(2) (1972). Under the OSHA scheme, different classes or types of respirators were required based on increasing levels of airborne asbestos in a workplace.

The Model 8500 nuisance dust mask, in contrast, was not designed for use around asbestos. Instead, it was designed only to provide some level of filtering for non-toxic, nuisance dusts. After the OSHA respiratory protection regulations were promulgated in 1971, use of Model 8500 nuisance dust masks to reduce exposure to asbestos in a workplace not only would have been contrary to the design and purpose of the product, but also contrary to the federal regulations governing OSHA regulated workplaces.

determine "fault" (as to products, whether they were "defective"). These Phase I trials divide defendants into three groups: (1) asbestos containing product manufacturers and distributors, (2) premises liability defendants, and (3) employer defendants, with the "fault" of the defendants in each group tried to separate juries. The Trial Scheduling Order also contemplates later "Phase II" trials to new juries, to decide causation and damages issues for individual plaintiffs. Under the Trial Scheduling Order, the new juries for the Phase II proceedings will receive instructions specifying the Phase I jury's verdict as to each defendant in each Phase II trial.

Given the unique nature of the claims against 3M and its respiratory protection products, the Trial Scheduling Order did not include those claims in the Phase I "common issues" trials. 3M subsequently asked the trial court to clarify 3M's status, and particularly to clarify that all issues as to 3M would be tried in the Phase II trials. Instead, however, the trial court announced on May 6, 2002 (a few days after the West Virginia Supreme Court of Appeals' decision on Mobil's writ petition) that 3M would be included in a Phase I trial. The court did not at that time identify any "common issues" as to 3M that could be tried, nor did it say whether the 3M mask and respirator claims would be included in one of the existing trial groups (*i.e.*, asbestos containing products, premises owners, employers) or in a separate trial group for respiratory protection products.

Because 3M believes that the mask and respirator claims do not involve any "common issues" that can be decided in a bifurcated proceeding by one jury and used by a different jury to determine liability, 3M asked the trial court to specify the questions that would be presented to the jury. Because 3M believes there are no common issues as between the claims against 3M and those against manufacturers and distributors of asbestos containing products, premises owners, or employers, 3M also asked the trial court to place

3M in its own (respiratory protection products) Phase I trial group. 3M did not receive a definitive answer from the trial court until August 12, 2002 – 42 days before the mass trial is scheduled to begin.

At the August 12, 2002 hearing the trial court ruled that the claims involving 3M's masks and respirators would not be tried to a separate Phase I jury, but rather to the same jury as the claims against manufacturers and distributors of asbestos containing products. Thus, claims against 3M's non-asbestos containing respiratory protection products will be tried in a supposed "common issues" trial not with other respiratory protection products, but instead with hundreds of asbestos containing products – products which are themselves of dramatically different types. As demonstrated by the petition and other briefs supporting the petition, the sheer number of products and defendants and the mass of evidence the jury will have to assimilate for hundreds of different asbestos containing products over more than thirty years in order to make product defect and time period determinations (as well as punitive damages determinations) for each product are simply staggering. Now, in the context of that same mass trial of hundreds of asbestos containing products, 3M must defend its Model 8710 respirator and Model 8500 nuisance dust mask – products which do not contain asbestos and which are themselves entirely different products from each other.

This Court laid out a basic framework for due process analysis in *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994). Where traditional common-law procedures "provide[] protection against arbitrary and inaccurate adjudication," a State's abrogation of that protection "raises a presumption that its procedures violate the Due Process Clause." *Id.* at 430. The presumption is overcome only where (1) the State provides a reasonably adequate "substitute for the protection provided by" the traditional procedure, or (2) social or other changes have made the

procedural protection unnecessary. *Id.* at 431. Employing that analysis, *Oberg* held that Oregon violated the Due Process Clause by abrogating judicial review of punitive damages awards for excessiveness. *Id.* at 432-35; *see also id.* at 435-36 (Scalia, J., concurring); *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 467 & n.1 (2000) (while Fed. R. Civ. P. 15 is not "itself a constitutional requirement," a party "cannot, consistently with due process," be deprived of the core procedural protections provided by that Rule).

The decision below upholds the aggregation and joint trial of thousands of unrelated claims against well over 100 defendants and several hundred products (the exact numbers being presently unknown) and does so regardless of jury confusion and other prejudice. This novel procedure, which the West Virginia Supreme Court of Appeals calls "conjoin[der]" (Pet. App. 10a, 13a) and holds is authorized by its new Trial Court Rule 26.01, is an elementary violation of the *Oberg* test. It abrogates traditional procedural safeguards limiting the aggregation of parties and claims as necessary to permit rational decisionmaking by the jury, and it provides no substitute protection of any kind.[4] Nor is there any question about the continuing need for the procedural

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[4] Any implication in the decision below that "the existence of common factual and/or legal issues" permitting these thousands of cases to "be grouped together for trial purposes" was determined at the time the cases were referred to the state Mass Litigation Panel, *see* Pet. App. 13a, is unfounded. The referral order (issued by a single justice) noted the lack of "specific litigation plans for the variety of cases that have been consolidated in this referral," and ordered a procedure "to develop specific rules and strategies to deal with the disposition of these cases." Administrative Order Re Mot. to Refer Asbestos Litig. to the Mass Litig. Panel 2, 3-4 (W. Va. Nov. 17, 2000) (Maynard, C.J.) ("Referral Order"). The West Virginia Supreme Court of Appeals itself said in its first decision after the Referral Order that "no decision has been reached as to whether mass trials will be held or not." *State ex rel. Allman v. MacQueen*, 551 S.E.2d 369, 373 (W. Va. 2001).

protection against confusion and prejudice. To the contrary, that protection is even more sorely needed at this advanced stage of the asbestos litigation saga, where many plaintiffs' counsel in their quest for still-solvent companies assert claims against ever more peripheral parties.

Under the procedural systems that evolved during the last century, it is commonplace "that it is desirable to include as many claims and parties as there are in one suit, *except where this may make the suit too many-sided and complicated for the jury to unravel, or where this free joinder may cause prejudice to some party or claim.*" Charles Alan Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 Minn. L. Rev. 580, 581 (1952) (emphasis added).[5] Thus, all of the basic aggregation devices under the Federal Rules of Civil Procedure – joinder of claims and parties, class actions, and consolidation of actions – contain procedural protections against the confusion and prejudice that would result from an unfettered use of these devices. For example, joinder of parties is limited by requiring both

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[5] *See, e.g., Gwathmey v. United States*, 215 F.2d 148, 155-56 (5th Cir. 1954) (joint trial of condemnation actions involving valuation of 236 tracts of land with many owners violated due process; "the very size of the case as tried, without the additional complexities, was such that the jury must have been overwhelmed. In fact, during the trial there [were] so many tracts and so much evidence that the witnesses, the attorneys and even the judge himself seemed to be confused at times."); *United States v. Central Supply Ass'n*, 6 F.R.D. 526, 534 (N.D. Ohio 1947) (granting judgments of acquittal at close of prosecution's case after three and a half months of trial in a criminal case involving 76 defendants; "To believe that an ordinary jury could hold in mind the names and identities of all the defendants and segregate and classify all the different bits of evidence, requires a faith and confidence in the human intellect which experience does not support. Faith that the verdict in such a case would be rational and fair, would have to be based on a blind trust in ritual contrary to all experience of possibilities."). The *Central Supply* court's dramatic description of the trial in that case, *see* 6 F.R.D. at 533-34, pales in comparison to the mass trial the West Virginia courts have ordered.

claims arising out of the same transaction or occurrence (or series thereof) and a question of law or fact common to all persons joined. Fed. R. Civ. P. 20(a). Issues of confusion and prejudice resulting from joinder of claims and parties are further addressed by giving trial courts broad authority to order (1) severance of parties and claims, and (2) separate trials of claims and issues. Fed. R. Civ. P. 20(b), 21, 42(b).

The same cannot be said for West Virginia's "conjoinder" procedure. That mass trial procedure permits the aggregation and joint trial of thousands of claims against hundreds of products and many scores of defendants, and does so without even the most cursory scrutiny of the dangers of confusion and prejudice. Such matters are not a subject of inquiry. *See* Pet. App. at 9a-13a. As the decision below reiterates, "because the provisions of TCR 26.01 control the underlying civil action, we do not view this matter as one affected by case law interpreting the various rules of civil procedure, including Rules 20, 23, or 42, which respectively address issues of joinder, class action, and consolidation." Pet. App. 4a (quoting *Allman*, 551 S.E.2d at 374). As a consequence, no analysis or even mention of issues of prejudice and confusion was made when, after the decision below, the trial court tossed the claims against 3M's respiratory protection products into the Phase I mass trial of claims against hundreds of different asbestos-containing products. Nor did the court identify any true "common issue" as between these respiratory protection products and the asbestos containing products.

Other due process violations, not directly raised by Mobil's petition, arise from the mass trial treatment of claims against 3M. For example, the trial court (as well as the West Virginia Supreme Court of Appeals in denying Mobil's writ petition) has never explained when and how defendants will be able to try affirmative and other defenses. West Virginia law also provides for a comparative fault defense, but the court has not explained how a defendant will have a

meaningful opportunity to litigate this defense. The Phase I jury will not hear evidence about individual plaintiffs or their conduct. The Phase II jury will not hear "fault" evidence about defendants (evidence required to make a meaningful comparison to evidence about the plaintiff's fault) unless the evidence presented in the Phase I trial is presented again to each Phase II jury, which would defeat entirely the ostensible purpose of the Phase I mass trial.

More generally, the trial court never has explained how this two-phase trial can be conducted, consistent with due process, as to the claims against 3M without presenting in Phase II all of the evidence presented in Phase I. If the Phase II jury is only instructed that the Phase I jury found a respiratory protection product was "defective," the plaintiffs would be relieved of proving an essential element of their claims in the individual Phase II trials – *i.e.*, that the aspect of the product the Phase I jury found defective was the cause of an individual plaintiff's harm. Likewise, 3M would be precluded from establishing a defense that the defect did not cause the plaintiff any injury in the circumstances of the plaintiff's use of the product. Furthermore, any instruction that a product has been found "defective," even if it could describe the reasons for the defect finding, would be enormously prejudicial in a Phase II trial.

The "right to litigate the issues raised" and present defenses are basic "right[s] guaranteed . . . by the Due Process Clause" of the Fourteenth Amendment to the United States Constitution. *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971); *see also, e.g.*, *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense") (citation omitted). The mass trial procedures contain no explanation how these due process rights can, or will, be protected, particularly for respiratory protection products.

This treatment of the claims against 3M further shows that West Virginia asbestos litigation is an abyss, with procedures so flawed and unfair that hundreds of defendants will have little practical choice but to settle with thousands of plaintiffs – most of whom likely are not impaired and never used or were injured by the particular defendant's products.[6] For the sake of a large segment of the Nation's economy, jobs, and retirement accounts, this Court should grant review and enforce basic federal constitutional limits on the West Virginia judicial system.

As Justice Maynard pointed out in his separate opinion below, the procedures fashioned by the West Virginia courts have operated as a magnet, attracting many non-West Virginia plaintiffs who "have migrated here because of the asserted pro-plaintiff bias with which Mobil claims this State handles asbestos litigation." Pet. App. 21a. The result is a vicious cycle in which the adoption of unfair mass trial procedures generates the filing of still more claims, leading to further efforts to deny the defendants' rights to due process.

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[6] One of the features of the West Virginia asbestos mass trial proceeding is that the defendants have not been allowed to conduct discovery as to individual plaintiffs, and the plaintiffs have not been required to provide meaningful disclosure as to the product(s) they actually used or to which they were exposed. Accordingly, 3M has been precluded from learning which of the nearly 2,000 plaintiffs asserting claims against it actually used a 3M product, the product that allegedly was used, and where and when it was used.

II. PUNITIVE DAMAGES EXACERBATE THE DUE PROCESS VIOLATION CAUSED BY APPLYING WEST VIRGINIA LAW TO CLAIMS HAVING NO CONNECTION TO THAT STATE.

The petition presents, as a second issue, the due process violation that results from applying West Virginia law to claims that have no contacts with West Virginia. As Justice Maynard also noted, the mass trial includes the claims of thousands of plaintiffs who "are not West Virginia residents and were never exposed to asbestos in this state." Pet. App. 21a. At the August 12, 2002 hearing, the trial court confirmed that West Virginia law will be applied to the claims of all plaintiffs, including those who neither lived nor worked in West Virginia and had no other connections to the State. The court stated: "We understand the argument made regarding the choice of law. We understand that there may be Plaintiffs that absolutely have no nexus whatsoever . . . . But . . . we are going to apply West Virginia law in all aspects of the first phase of this trial." 8/12/02 Hearing Tr. 172.

The trial court also ruled at the August 12 hearing that the Phase I trials will include a punitive damages finding and use of a "punitive damages multiplier." Under this procedure, the Phase I jury will determine whether each defendant is responsible for punitive damages and, if so, a number by which the Phase II jury's compensatory damages award will be "multiplied" to determine the amount of punitive damages. The Phase I jury will make its findings on punitive damages and fix the multiplier without evidence of any plaintiff's injury, the amount of the compensatory damages awarded to any plaintiff (or in total), or the circumstances of any plaintiff's product use.

As discussed below, these rulings rachet up the pressure to settle on any company named as a defendant in

these cases. In combination, these two rulings also magnify the due process violation perpetrated by the mass trial proceeding.

With respect to choice of law and the punitive damages multiplier specifically, to our knowledge, no appellate court of any other State has permitted use of that procedure. Maryland's highest court has rejected its use under Maryland substantive law. *See Phillip Morris, Inc. v. Angeletti*, 752 A.2d 200, 249 (Md. 2000). Use of the punitive damages multiplier is also illegal under Texas law, which forbids any determination of punitive damages liability until compensatory damages are established. *See Southwestern Refining Co., Inc. v. Bernal*, 22 S.W.3d 425, 432-39 (Tex. 2000). The multiplier procedure also violates the laws of Kentucky and North Carolina, which require that compensatory damages be tried first, and/or that the same jury decide both compensatory and punitive damages. *See* Ky. Rev. Stat. Ann. § 411.186; N.C. Gen. Stat. Ann. § 1D-30; *see also Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 & n.28 (Tex. 1994) (discussing similar statutes in 13 other States).[7]

More generally and quite apart from use of the multiplier, there are major differences among States' punitive damages laws. Not the least of these differences is the very conduct required for the imposition of any punitive award. For example, although "gross negligence" is sufficient to

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[7] The leading authority supporting use of a punitive damages multiplier was *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986), which held it permissible under Texas substantive law (the governing law in *Jenkins*). *Id.* at 474. The Texas Supreme Court's decision in *Southwestern Refining* shows that *Jenkins*' view of Texas law was incorrect. 22 S.W.3d at 432-33. The Fifth Circuit itself rejected (under federal law) a similar procedure that would allow punitive damages liability to be determined before compensatory damages. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417-18 (5th Cir. 1998).

support punitive damages under West Virginia law,[8] the laws of many States – among them Pennsylvania, Virginia, Maryland, and North Carolina – do *not* allow punitive damages to be awarded for conduct that is only grossly negligent.[9] Similarly, West Virginia does not require proof of actual malice for punitive damages,[10] while other States such as Maryland and Ohio do.[11] Other significant differences in state laws regarding punitive damages range from total prohibition[12] and damage caps[13] to the relevance and admissibility of financial condition evidence.[14] In short, there are multiple levels of significant conflict among state punitive damages laws relevant to the claims involved in the mass trial here.

Accordingly, West Virginia's insistence on applying its law to the claims of plaintiffs having no connection to that State violates due process in more ways than one. As to punitive damages, that use of West Virginia's law conflicts not only with *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797

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[8] *TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870, 877-87 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993).

[9] *See, e.g., Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 652 (Md. 1992); *SHV Coal, Inc. v. Continental Grain Co.*, 587 A.2d 702, 705 (Pa. 1991); *Wright v. Everett*, 90 S.E.2d 855, 858 (Va. 1956); N.C. Gen. Stat. Ann. § 1D-5(7).

[10] *TXO*, 419 S.E.2d at 887.

[11] *Scott v. Jenkins*, 690 A.2d 1000, 1003-04 (Md. 1997); *Buckeye Union Ins. Co. v. New England Ins. Co.*, 720 N.E.2d 495, 501 (Ohio 1999).

[12] *See, e.g., State ex rel. Cherry v. Burns*, 602 N.W.2d 477, 484 (Neb. 1999).

[13] *See, e.g.*, Va. Code Ann. § 8.01-38.1.

[14] *Compare Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 909 (W. Va. 1992) ("relevant"), *with Hardaway Management Co. v. Southerland*, 977 S.W.2d 910, 916 (Ky. 1998) ("may not present evidence or otherwise advise the jury").

(1985), but also with this Court's decision that a State may not apply its punitive damages law to punish conduct that was lawful in the State where it occurred. *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 570-73 (1996).[15]

The punitive damages multiplier also independently violates the Due Process Clause. Under that procedure, the jury that determines punitive damages liability and sets the multiplier does so without knowing the actual harm that a defendant's conduct caused to any individual plaintiff, or collectively to all plaintiffs. This violates the requirement that the reasonableness of a punitive award be evaluated in the light of actual harm caused by the defendant's conduct. *See Gore*, 517 U.S. at 580-81; *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440-41 (2001).

Even more fundamentally, the punitive damages multiplier violates due process in that neither the amount of punitive damages appropriate in any case nor its impact on the defendant is ever determined by any jury. Under the procedure, no jury ever decides the amount of a punitive award. Rather, one jury sets an abstract multiplier, another determines the compensatory award and someone mechanically does the math. The result is that no jury ever decides whether the amount of punitive damages assessed against the defendant – either as to the individual plaintiff or collectively – is necessary for punishment and deterrence. This approach radically departs from the traditional procedure for assessing punitive damages, and from the traditional justifications for imposing such damages. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991).

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[15] In *Gore*, this Court also noted (without deciding) the issue "whether one State may properly attempt to change a tortfeasor's *unlawful* conduct in another State." 517 U.S. at 573 n.20 (emphasis in original).

III. THIS COURT SHOULD REVIEW THE MASS TRIAL DECISION NOW.

The decision below unquestionably is a "final judgment[] or decree[]" for purposes of this Court's jurisdiction under 28 U.S.C. § 1257(a). Under this Court's longstanding precedents, a decision by a state supreme court granting or denying a writ of mandamus or prohibition is a "final" decision within the meaning of § 1257(a) and predecessor statutes. Pet. 27; *Michigan Central R.R. v. Mix*, 278 U.S. 492, 494 (1929) ("The application for the writ of prohibition was denied [by the Supreme Court of Missouri] without an opinion. That judgment is final within the meaning of § 237(a) of the Judicial Code.").[16]

It is appropriate and important that this Court grant review at this point in the underlying mass trial litigation. As petitioners argue, abusive aggregations of tort claims present Armageddon scenarios, in which defendants may be – indeed, are intended to be – effectively compelled to settle non-meritorious and marginal claims. If the tactic is

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[16] *See also, e.g., Detroit & Mackinac Ry. Co. v. Michigan R.R. Comm'n*, 240 U.S. 564, 570-71 (1916):

> Our jurisdiction is called in question upon the ground that the judgment is not final in the sense of § 237, Judicial Code, upon which our power to review depends, because the judgment does not determine the merits and end the litigation. But, as this court has said, "all judgments and decrees which determine the particular cause" are final in the sense of the statute. This view has prevailed through a century of practice in reviewing judgments and decrees dismissing causes for want of jurisdiction or for other reasons not decisive of the merits. And it is settled that a proceeding in mandamus is an independent adversary suit and a judgment awarding or refusing the writ is a final judgment within the meaning of statute.

successful, as it typically has been in the absence of pre-trial appellate review, the result is to avoid appellate review altogether. Federal courts of appeals have become increasingly aware of this evolving mass litigation phenomenon, and therefore increasingly willing to grant interlocutory review before the irreparable harm occurs and appellate review is evaded. *See, e.g., In re Bridgestone/Firestone, Inc., Tires Products Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002) (Easterbrook, J.) (interlocutory review under Fed. R. Civ. P. 23(f)); *In re Dow Corning Corp.*, 86 F.3d 482, 487-88 (6th Cir. 1996) (collateral order doctrine); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (interlocutory review under 28 U.S.C. § 1292(b)); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995) (Posner, C.J.) (mandamus); *In re Pan Am Corp.*, 16 F.3d 513 (2d Cir. 1994) (collateral order doctrine); *see also* Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. Rev. 527, 554-84 (2002).

Rhone-Poulenc involved a situation similar to this one, with an unlawful aggregation of claims, 51 F.3d at 1302-04, and use of a single negligence standard rather than the actual tort law of the 50 States, *id.* at 1300-02. Ruling that pre-trial review by writ of mandamus was appropriate and necessary, Chief Judge Posner reasoned that:

> It is true that [the first phase of the bifurcated trial] would only be prima facie liability, [and] that the defendants would have various defenses [to assert in later proceedings]. But they could not be confident that the defenses would prevail. They might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle. If they settle, the class

> certification – the ruling that will have forced them to settle – will never be reviewed. Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action "blackmail settlements."

51 F.3d at 1298 (citations omitted).[17] The blackmail threat is no less real in this mass asbestos litigation.

Manipulation of choice of law rules and illegal use of a single law to govern multi-state claims is a device frequently employed in coercing "blackmail settlements." *See Bridgestone/Firestone*, 288 F.3d at 1016-18; *Rhone-Poulenc*, 51 F.3d at 1300-01; *cf. Castano*, 84 F.3d at 741-44. Here, the West Virginia courts are racheting the pressure created by that device still further, applying West Virginia's punitive damages law and a "multiplier" to all plaintiffs and claims in contravention of this Court's holdings in *Gore* as well as *Shutts*.[18] Unlike *Bridgestone/Firestone, Rhone*

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[17] *See also Bridgestone/Firestone*, 288 F.3d at 1015-16 ("[a]ggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable – and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims"); *Castano*, 84 F.3d at 746 ("Class certification magnifies and strengthens the number of unmeritorious claims. . . . In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle . . . . These settlements have been referred to as judicial blackmail."); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.) (noting that "empirical studies" support the view that class actions are commonly used "to wring settlements from defendants whose legal positions are justified but unpopular").

[18] In truth, the West Virginia courts are not even applying normal West Virginia law, but rather a special punitive damages law crafted solely for mass trials. For example, under normal West Virginia law, the jury must consider whether any punitive damages are necessary in light of the (...continued)

Poulenc and *Castano*, however, this mass litigation is in state rather than federal court. In this instance, this Court is the only federal appellate court able to vindicate the Supremacy Clause and due process guarantees of the federal Constitution. Particularly given that there is no "final judgment" jurisdictional issue, this Court should grant review and do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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amount of compensatory damages awarded. *See, e.g., Painter v. Raines Lincoln Mercury, Inc.*, 323 S.E.2d 596, 598-99 n.2 (W. Va. 1984); *Addair v. Huffman*, 195 S.E.2d 739, 743 (W. Va. 1973); *Mayer v. Frobe*, 22 S.E. 58, 63 (W. Va. 1895). The multiplier procedure makes this impossible, because the jury determines whether punitive damages should be awarded and a multiplier without knowing the amount of any compensatory award.